

**STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES**

In Re:
APPEAL BY JOHN MICHAEL

APPELLANT MICHAEL'S
HEARING BRIEF

I. FACTUAL BACKGROUND

John Michael, of Auburn, Maine, is running for Governor. On June 2, 2006 he submitted 2,690 qualifying contributions to be certified as a Clean Election candidate under the Maine Clean Elections Act, Title 21-A M.R.S.A. §1121, et. seq. He only needed 2,500 qualifying contributions to qualify.

However, the Ethics Commission declared 746 of his contributions to be “invalid”; leaving him 556 contributions short of the 2,500 necessary to qualify.

Mr. Michael appeals the decision of the Ethics Commission, and believes he submitted at least 2,500 valid “qualifying contributions”.

II. STATUTORY FRAMEWORK

The Maine Clean Elections Act provides, in pertinent part:

“Section 1122. Definitions.

7. Qualifying contribution. “Qualifying contribution” means a donation:

- A.** Of \$5 in the form of a check or a money order payable to the fund in support of a candidate;
- B.** Made by a registered voter within the electoral division for

- the office a candidate is seeking;
- C. Made during the designated qualifying period and obtained with the knowledge and approval of the candidate; and
- D. That is acknowledged by a written receipt that identifies the name and address of the donor on forms provided by the Commission.

- 8. **Qualifying Period.** “Qualifying period” means the following.
 - A. For a gubernatorial participating candidate, the qualifying period begins November 1st immediately preceding the election year and ends at 5:00 p.m. on April 15th of the election year unless the candidate is unenrolled, in which case the period ends at 5:00 p.m. on June 2nd of the election year.”

“Section 1125. Terms of participation.

- 3. **Qualifying contributions.** Participating candidates must obtain qualifying contributions during the qualifying period as follows:
 - A. For a gubernatorial candidate, at least 2,500 verified registered voters of this State must support the candidacy by providing a qualifying contribution to the candidate ...

A candidate may pay the fee for a money order in the amount of \$5, which is a qualifying contribution, as long as the donor making the qualifying contribution pays the \$5 amount reflected on the money order. Any money order fees paid by a participating candidate must be paid for with seed money and reported in accordance with Commission rules.

- 4. **Filing with commission.** A participating candidate must submit qualifying contributions to the Commission during the qualifying period according to procedures developed by the Commission, except as provided under subsection 11.
- 5. **Certification of Maine Clean Election Act candidates.** Upon receipt of a final submittal of qualifying contributions by a participating candidate, the Commission shall determine whether or not the candidate has: ...
 - B. Submitted the appropriate number of valid qualifying contributions ...
 - E. Otherwise met the requirements for participation in this Act.

The Commission shall certify a candidate complying with the requirements of this section as a Maine Clean Election Act candidate as soon as possible and no later than 3 business days after final submittal of qualifying contributions ...

11. Other procedures. The Commission shall establish by rule procedures for qualification, certification...”

Wherever these statutes provide that something “shall” or “must” be done, then the statute creates a mandatory requirement. See: Title 1 M.R.S.A. §71(9-A); Title 21-A M.R.S.A. §7; and McGee v. Secretary of State, 2006 ME 50, at page 4, paragraphs 14 and 15. However, any statutory provision that does not contain the words “shall” or “must” is merely directory, rather than mandatory. A candidate is only required to “substantially comply” with those statutory provisions, and strict compliance is not required. See: McGee v. Secretary of State, 2006 ME 50, pages 3-4, paragraph 13.

Furthermore, §1125(4) provides: “A participating candidate must submit qualifying contributions to the Commission during the qualifying period according to procedures developed by the Commission, except [if the Commission develops other rules of procedures].” [Emphasis added.]

III. ETHICS COMMISSION’S RULES

The Ethics Commission’s rules (Chapter 3) concerning the Maine Clean Election Act and related provisions read, in pertinent part:

“SECTION 2. PROCEDURES FOR PARTICIPATION

4. Qualifying Contributions ...

F. Verification of Registered Voters ...

- (3) Upon request of a participating candidate, and within 10 business days after the date of the request, the Registrar must verify the names of contributors of qualifying contributions who are registered voters within the electoral division for the office the candidate is seeking ...

H. Submission of Verified Qualifying Contributions. A participating candidate may submit a completed request for certification to the Commission at any time during the qualifying period. The request will be deemed complete and the candidate will be certified only if:

- (1) the request is accompanied by the original signed qualifying contributions forms that have been verified by the Registrar(s) of the electoral division for the office the candidate is seeking; or
- (2) the candidate submits to the Commission during the qualifying period a statement that such signature forms have been submitted to the Registrar(s) for verification on a specific date and the verified signature forms will be received by the Commission within 10 business days thereafter, and submits to the Commission during the qualifying period photocopies of the signature forms.”

“SECTION 3. CERTIFICATION OF PARTICIPATING CANDIDATES ...

- 1.B. All participating candidates must submit qualifying contributions in alphabetical order the Commission along with qualifying contribution forms and an alphabetical list of contributors of qualifying contributions when applying for certification as a Maine Clean Election Act candidate.”

In general, rules and regulations governing elections are considered “directory”, and not mandatory, and only need to be “substantially complied with”, rather than strictly complied with. See generally: Opinion of the Justices, 124 Me. 453, 474-75 (1924); and

McGee v. Secretary of State, 2006 ME 50, pages 3-4, paragraph 13.

IV. ARGUMENTS

A. The Ethics Commission violated Title 21-A M.R.S.A. §1125(5).

Again, Title 21-A M.R.S.A. §1125(5) provides, in pertinent part:

“The Commission **shall** certify a candidate complying with the requirements of this section as a Maine Clean Election Act as soon as possible **and no later than 3 business days after final submission of qualifying contributions.**” [Emphasis added.]

Again, when the word “shall” is used in a statute, that statutory provision is mandatory, and must be complied with. See: Title 1 M.R.S.A. §71(9-A); Title 21-A M.R.S.A. §7; and McGee v. Secretary of State, 2006 ME 50, page 4, paragraphs 14 and 15.

The evidence at the hearing will show that Mr. Michael made his final submission of qualifying contributions on June 16, 2006. Three business days thereafter would have been June 21. However, the Commission did not purport to reject his request to be certified as a Clean Election candidate until June 30.

Since the statute required the Commission to certify Mr. Michael as a Clean Election candidate on June 21, he must be deemed to have been certified on June 21, and the Commission’s attempt to deny him certification on June 30 was invalid as a matter of law.

B. Objection to the make up of the Commission.

Title 1 M.R.S.A. §1002 provides, in pertinent part:

“1-A. Membership. The Commission on Governmental Ethics and Election Practices, established by Title 5, §12004-G, subsection 33 and referred to in this chapter as the “Commission,” consists of 5 members appointed as follows ...

- C.** ... No more than 2 Commission members may be enrolled in the same party...
- F.** Upon a vacancy during an unexpired term, the term **must** be filled as provided in this paragraph for the unexpired portion of the term only ...
- G.** Upon a vacancy created by an expired term, the vacancy **must** be filled as provided in this paragraph ...” [Emphasis added.]

The Commission currently consists of only four members - two Democrats and two Republicans. The fifth member (an Independent) left the Commission over a year ago, and his seat still has not been filled despite the statutory mandate that any such vacancy **must** be filled.

Mr. Michael objects to the Commission hearing his appeal until there are five members on the Commission, as required by statute, and that fifth member is not either a Democrat or a Republican.

C. Discrimination.

Mr. Michael believes that the Commission staff has discriminated against him, in denying his request for certification as a Clean Election candidate, because he is a conservative, Independent candidate.

Article I, section 6-A of the Constitution of Maine provides, in pertinent part:

“Section 6-A. Discrimination against persons prohibited.

No person shall ... be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof.”

Similarly, the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

“... No State shall ... deny to any person within its jurisdiction the equal protection of the laws.”

For the State to discriminate against a political candidate because of his political views is illegal discrimination based on the content of the candidate’s fundamental “free speech” rights, and therefore is subject to strict scrutiny. See generally: Rosenberger v. Rector and Visitors of the University of Virginia, 115 S.Ct. 2510 (1995). To withstand “strict scrutiny” the State must show that it had a “compelling state interest” to discriminate against Mr. Michael, and that denying his request for certification as a Clean Election candidate was the “least restrictive means” for achieving that compelling interest. See generally: School Administrative District 1 v. Commissioner, Department of Education, 659 A.2d 854 (Me. 1995). Needless to say, the State cannot show that it had a “compelling interest” for discriminating against Mr. Michael because of his conservative, Independent political views and speech.

In fact, the State cannot even show a “reasonable basis” for discriminating against Mr. Michael because he is a conservative, Independent candidate; which is the less exacting standard that would be used if the State were not discriminating against him because of his fundamental right to free speech. See generally: Green v. Commissioner

of Mental Health and Mental Retardation, 750 A.2d 1265 (Me. 2000).

D. Arbitrary and capricious enforcement, and abuse of discretion.

The evidence will show that the Ethics Commission has arbitrarily and capriciously enforced the Clean Election law and its own rules against Mr. Michael, and has abused its discretion in dealing with him, especially when compared to how the Commission has dealt with the other candidates. Such arbitrary and capricious enforcement, and abuse of discretion, requires that the Commission's denial of Mr. Michael's request for certification as a Clean Election candidate be overturned. See generally: Kroeger v. Department of Environmental Protection, 870 A.2d 566 (Me. 2005).

E. Late submission of certification materials on June 16, 2006.

In his June 30 denial letter, Assistant Commissioner Lavin states that Mr. Michael was 35 seconds late in filing his materials on June 16.

According to Commission rule 2(4)(H)(2), Mr. Michael had ten business days after June 2 to submit original R & A forms. The 10th business day was June 16. The rule does not set any time deadline on June 16. Since Mr. Michael did, in fact, submit his original R & A forms to the Commission on June 16, he was in compliance with the rule.

Mr. Lavin's staff was still in the building conducting business at 5:00.35 p.m., and accepted Mr. Michael's original R & A forms. Therefore, he did file those originals on the tenth business day, and even filed them during business hours (i.e. - while the

Commission staff was still there conducting business).

To our knowledge, there is no statute, rule, executive order, or anything else that says that a business day ends precisely at 5:00.00 p.m. Furthermore, even if there were such a statute, rule, executive order, etc., missing any such deadline by 35 seconds clearly must be considered *de minimis*, and cannot provide the basis for invalidating all of Mr. Michael's qualifying contributions related to the R & A forms he filed that afternoon. See generally: The Candle Co. V. LCM Associates, 749 A.2d. 150 (Me. 2000); Sproul v. Town of Boothbay Harbor, 746 A.2d 368 (Me. 2000); and State v. Kargar, 679 A.2d 81 (Me. 1996).

F. Failure to provide an alphabetical list of contributors.

Again, rule 3(1)(B) states:

“All participating candidates must submit qualifying contributions in alphabetical order to the Commission along with qualifying contribution forms and an alphabetical list of contributors of qualifying contributions when applying for certification as a Maine Clean Election Act candidate.”

The evidence will show that Mr. Lavin waived the “requirement” of an alphabetical list of contributors by telling Mr. Michael's counsel not to worry about having Mr. Michael submit that list because the Commission staff was preparing a computer spreadsheet of all contributions, and would generate an alphabetical list of its own. Furthermore, the “requirement” of an alphabetical list of contributors is directory, and not mandatory; and Mr. Michael was not required to “substantially comply” with that

rule because the Commission generated its own alphabetical list of contributors even before Mr. Michael would have been able to do so, on June 16. Certainly any violation of that rule was *de minimis* under the circumstances, and cannot provide a basis for invalidating all of Mr. Michael's qualifying contributions.

Furthermore, the alphabetical list rule exceeds the Commission's rulemaking authority under the Maine Clean Election Act, and is therefore invalid. Section 1125(11) of the Act empowers the Commission to: "establish by rule procedures for qualification, certification ...". The providing of an alphabetical list to the Commission is simply a convenience for the Commission, and is not aimed at helping the Commission determine whether qualifying contributions are valid. In fact, since the Commission puts all of the data into its computer and generates its own alphabetical list, the evidence will show that any alphabetical list submitted by a candidate is superfluous, and does not even serve as a convenience to the Commission.

G. Alleged fraudulent contributions.

In his June 30 letter, Mr. Lavin claims that all of Mr. Michael's qualifying contributions should be declared invalid because the Commission staff called 218 of Mr. Michael's contributors, and 18 of those individual contributors said that they did not make a qualifying contribution to Mr. Michael.

Certainly, the Commission can disqualify a candidate's entire effort if the Commission can prove that the candidate himself actually participated in the fraudulent

scheme. However, there is no legal authority to support the invalidating of a candidate's entire effort if a few of his helpers engage in some instances of fraudulent conduct unbeknownst to the candidate. Compare: Palesky v. Secretary of State, 711 A.2d 129 (Me.1998) with: Maine Taxpayers Action Network v. Secretary of State, 795 A.2d 75 (Me. 2002).

In addition, while Title 21-A M.R.S.A. §1125(14)(B) says that Appellant Michael has the burden of providing evidence to demonstrate that Mr. Lavin's decision was improper, nevertheless Maine law says that the Commission has the burden of proving that Mr. Michael participated in a fraudulent scheme by clear and convincing evidence. See generally: Spickler v. Greenberg, 644 A.2d 469 (Me. 1994). Consequently, Mr. Michael only needs to produce evidence to establish that there is less than "clear and convincing evidence" that he participated in any fraudulent scheme.

In fact, in this case there will be no evidence whatsoever that Mr. Michael participated in any alleged fraudulent scheme. Consequently, Mr. Lavin's decision invalidating all of his qualifying contributions on that basis must be reversed.

H. Specific Qualifying Contributions.

1. **Form delivered to the Ethics Commission after 10-day deadline (7) and 10-day deadline unknown (279).**

In his June 30 letter Mr. Lavin states that 7 of Mr. Michael's qualifying contributions were found invalid because the original R & A forms turned in on June 16

had been given to the town voter registrars more than 10 business days prior to June 16.

In addition, Mr. Lavin declared invalid 279 qualifying contributions because he could not tell whether original R & A forms turned in on June 16 had been given to voter registrars more than 10 business days prior to June 16.

Mr. Lavin is apparently misreading Commission rule 2(4)(H)(2). That rule reads, in pertinent part:

- “H. ... The request will be deemed complete and the candidate will be certified only if: ...
 - (2) the candidate submits to the Commission during the qualifying period a statement that such signature forms have been submitted to the Registrar(s) for verification on a specific date and the verified signature forms will be received by the Commission with 10 business days thereafter, and submits to the Commission during the qualifying period photocopies of the signature forms.”

That rule requires Mr. Michael to submit to the Commission on or before June 2 a statement that the original R & A forms had been submitted to voter registrars on a specific date, and that the forms would be turned in to the Commission within ten business days after Mr. Michael submitted that statement; not ten days after the forms were submitted to the voter registrars. Mr. Michael submitted his statement on June 2, and stated that he would submit all original R & A forms within ten business days thereafter - that date being June 16. Mr. Michael did submit the original R & A forms on June 16. Therefore, these 286 qualifying contributions should not have been declared invalid.

In addition, Mr. Lavin’s reading of the rule does not make sense. Rule 2(F)(3)

gives voter registrars ten business days to certify that the names on R & A forms are registered voters. If a voter registrar took the full ten business days allowed, then it would be impossible for the candidate to submit the original, certified R & A forms to the Commission within ten business days of the date they were submitted to the voter registrar.

Furthermore, if Mr. Michael had sent all of his R & A forms to voter registrars on or before May 22, then on June 2, when he submitted his statement to the Commission, under Mr. Lavin's interpretation of the rule, all of those forms would already be late, and all those contributions would be invalid! Clearly, that was never contemplated by the rule. The rule was intended to give candidates 10 business days from the date that they submit their statement (that original R & A forms had been sent to the voter registrars for certification) to finally submit the certified original R & A forms to the Commission.

In addition, Mr. Lavin's interpretation would create a logistical nightmare for candidates. Rather than allowing Mr. Michael to gather all of the certified R & A forms together and bring them up to Augusta *en mass* on June 16, it would have required him to keep track of which R & A forms were submitted to town clerks on June 30, make sure he collected those by July 14 (before the registrars' ten business day deadline had expired), and rush those forms up to Commission on June 14. Then he would have had to keep track of which R & A forms were submitted to town clerks on July 1, gather them up from the voter registrars by July 15 (again before their 10 business day deadline had expired), and rush them up to the Commission by the end of the day on July 15. Then all

R & A forms submitted to town clerks on July 2 ... well, you get the picture. It certainly makes more sense that the rule requires one final submission of original, certified R & A forms within ten business days after the candidate submits his statement that the original forms had been submitted to the town voter registrars - as Mr. Michael did in this case.

The Commission's rules are supposed to establish reasonable procedures for candidates to submit qualifying contributions. The rules should not place impossible burdens on candidates or create difficult hurdles simply to invalidate a candidate's contributions.

Finally, if the rule is to be read as Mr. Lavin contends - which seems unlikely - then any violation of that rule by Mr. Michael was *de minimis*, since all original R & A forms were filed by June 16.

2. Original R & A forms submitted to the town after June 2 (219).

In his June 30 letter, Mr. Lavin states that 219 qualifying contributions are invalid because the original R & A forms were not submitted to town voter registrars until after June 2, which is a violation of rule 2(4)(H)(2).

However, rule 2(4)(H)(2) does not require original R & A forms to be submitted to voter registrars by June 2. Again, that rule requires a candidate to submit a statement by June 2 that original R & A forms have been submitted to registrars for verification on a specific date and that the verified signature forms will be submitted to the Commission ten business days after that statement. Mr. Michael submitted the required statement, and

honestly believed that his staff had sent all original R & A forms to town voter registrars for verification by the time he submitted that statement. Also, at the time he submitted that statement, Mr. Michael submitted all of his contributions and photocopies of the R & A forms.

Unfortunately, Mr. Michael later learned that his staff neglected to send out some of the original R & A forms on June 2. However, all of those original R & A forms were subsequently submitted to town voter registrars, and were filed with the Commission by the June 16 deadline.

Mr. Michael did not violate the letter of rule (2)(4)(H) ... he did submit to the Commission during the qualifying period a statement that the signature forms had been submitted to the registrars for verification on a specific date and that the verified signature forms would be received by the Commission within ten business days; and he submitted to the Commission on June 2 photocopies of the signature forms.

Mr. Michael also did not violate the spirit of the rule, since he did submit the verified original R & A forms on June 16.

Consequently, these 219 qualifying contributions should not be invalidated.

3. Contributor not a registered voter (183)

Mr. Michael questions that 183 contributors were not registered voters, and will prove at the hearing that many of those contributors are, in fact, registered voters.

4. Original R & A forms submitted on June 16, but copy never submitted on June 2 (69).

On June 2 Mr. Michael submitted contributions of some contributors (Mr. Lavin says 69), but did not submit photocopies of their R & A forms because his staff had already sent the R & A forms to the town voter registrars for certification and had neglected to make copies of those forms.

Mr. Michael received the original, certified R & A forms back from the registrars and filed them with the Commission on June 16. Nevertheless, Mr. Lavin declared those qualifying contributions invalid under rule 2(4)(H)(2), because photocopies of the R & A forms were not submitted to the Commission on June 2.

While Mr. Lavin's reading of rule 2(4)(H)(2) is technically correct, that rule is directory, and not mandatory. Mr. Michael substantially complied with that rule by doing what he could under the circumstances, and submitting the certified, original R & A forms by June 16.

In addition, the evidence at the hearing will show that the failure to submit photocopies of the R & A forms on June 2 was a *de minimis* violation of the rule, since it did not hamper the Commission's ability to review and analyze the qualifying contributions.

5. Other reasons for invalidation (108).

In his June 30 letter, Mr. Lavin lists a number of other reasons for invalidating

another 108 of Mr. Michael's qualifying contributions. The Appellant will not discuss those other reasons in this Brief. However, he believes the evidence at the hearing will confirm his positions set forth in his July 10 corrected notice of appeal concerning those other reasons for invalidation.

Respectfully submitted this ____ day of July, 2006.

By: _____
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